INFREQUENCY AS CONSTITUTIONAL INFIRMITY

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I. INTRODUCTION 95
II. A PENALTY IN DECLINE 97
  A. *The Facts* 98
  B. *Relative Scarcity* 101
III. RARITY AS SOCIETAL REJECTION 104
IV. NO VALID PENOLOGICAL INTEREST 108
  A. *Deterrence* 109
  B. *Incapacitation* 113
  C. *Retribution* 115
  D. *Conclusion* 116
V. THE FAILURE TO NARROW 117
VI. CONCLUSION 123

I. INTRODUCTION

The death penalty today is in a steady retreat both in the United States and around the world. An increasing number of countries have rejected the punishment entirely, leaving the United States alone among Western democracies in continuing to sentence its citizens to death and in carrying out that punishment against them.[1] Moreover, by any measure, the death penalty is falling into increasing disuse within this country: Compared to years past, it is being sought less often, imposed less often, and carried out less often, in increasingly fewer states and counties.[2]

On the one hand, this shrinking of the American death penalty could be taken as reason enough for federal courts to avoid meddling in the affairs of

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1. *See, e.g.*, STEVEN SHATZ ET AL., CASES AND MATERIALS ON THE DEATH PENALTY 866 (3d ed. 2009) ("The United States . . . is one of a minority of countries in the world that employs the death penalty for ordinary crimes. According to Amnesty International, as of 2008, 59 countries retained and employed the death penalty for ordinary crimes, while 138 had abolished the death penalty for ordinary crimes . . . . All of the countries of Europe, except Belarus, have abolished the death penalty. The same is true of all the countries of Latin America, except Cuba and Guatemala. By contrast, in the Middle East and North Africa, only Israel and Turkey are abolitionist, and virtually all the countries of Asia, including the world's two largest countries, China and India, retain and employ the death penalty."). It is worth noting that eastern democracies—notably Japan and India—continue to use the punishment. *Id.* at 866, 871. But their use of the death penalty appears almost entirely symbolic.

2. *See infra* Part II (noting the declining use of the death penalty).

state governments.[3] If the Eighth Amendment operates as a one-way ratchet—removing, possibly forever, certain penalties from the arsenal of the states—then the Supreme Court should use its authority to rein in the authority of the states judiciously.[4] Under this theory, the United States Supreme Court—having determined more than forty years ago that the death penalty is not unconstitutional per se—should defer to the judgments of legislators, prosecutors, judges, and juries around the country regarding how and whether the law's ultimate punishment should be imposed.[5]

In this Article, however, I argue that the infrequency with which the death penalty is currently being imposed in this country is one of the principal reasons that courts *should* intervene to prevent it.[6] Infrequency is the fatal flaw in the contemporary imposition of the death penalty for at least three reasons. First, and most obviously, it demonstrates that the penalty has been rejected by contemporary society, and that as a result, its imposition is a cruel and unusual punishment under the Eighth Amendment.[7] Second, a punishment imposed so infrequently—and wantonly—can serve no valid penological interest.[8] The argument that the death penalty is necessary to deter crime, incapacitate offenders, or offer retribution to victims and society more generally is undercut by the fact that the percentage of all killers who receive the penalty is vanishingly small. And finally, the infrequency with which the death penalty is currently imposed demonstrates that the fundamental problem identified by the Supreme Court in *Furman v. Georgia*

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3. *See Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/number-executions-state-and-region-1976 (last updated Dec. 14, 2018). Although the federal government and system of military justice continue to provide for the death penalty, they account for only a tiny fraction of the death sentences imposed and executions carried out in the United States each year. *See generally The U.S. Military Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/us-military-death-penalty#facts (last visited Jan. 2, 2019).

4. *See, e.g.*, Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847, 870 (2007) ("In oral arguments in [*Atkins v. Virginia*], Justice Scalia indicated that an Eighth Amendment consensus must be declared only with great caution because 'once [the Court has] decided that you cannot legislate the execution of [a particular group of people], there can't be any legislation that enables us to go back.'").

5. Gregg v. Georgia, 428 U.S. 153, 206–07 (1976).

6. I do not argue, of course, that infrequency is the only reason to strike down the death penalty. As a co-author and I previously wrote in response to a critique of our focus on *Furman* challenges:

> We believe it is possible—indeed laudable—to build up one theory of constitutional attack on the death penalty without tearing down others. The various requirements of the Eighth Amendment are not a zero-sum game. . . . Our central point is that these doctrines are perfectly consistent with one another. The argument is not just that there is no conflict among the various challenges to the death penalty; rather we argue that there is not even a tension between, say, challenging the defendant's intellectual capacity, the role the defendant played in the killing, and the means by which the state seeks to put the defendant to death in the same proceeding.

Sam Kamin & Justin Marceau, *Remember Not to Forget* Furman*: A Response to Professor Smith*, 100 IOWA L. REV. BULL. 117, 122–23 (2015).

7. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 321 (2002); Trop v. Dulles, 356 U.S. 86, 101 (1958) (concluding that the Eighth Amendment derives its meaning from "the evolving standards of decency that mark the progress of a maturing society").

8. *See Atkins*, 536 U.S. at 321; *Trop*, 356 U.S. at 101.

in 1972 has not yet been solved.[9] Then as now, there is no principled way of distinguishing the very few cases in which the death penalty is imposed from the much larger pool of those eligible to receive the law's ultimate penalty.

II. A PENALTY IN DECLINE

The fact that a penalty is infrequently used does not, without more, prove that it is an unusual punishment. For example, we cannot conclude from the fact that few people are sentenced to death for espionage that the death penalty is an unconstitutional penalty for that crime.[10] That few people are put to death for espionage in this country is largely a result of the fact that few people are convicted of that crime; what is unusual is not the punishment but the crime itself.[11]

Thus, in determining whether a punishment is used infrequently, we need to determine not just the numerator (the number of death sentences imposed) but also the denominator (the number of cases eligible for death).[12] To do this, it is necessary to know, at some level, how many people are eligible for death in the United States each year.

9. Furman v. Georgia, 408 U.S. 238, 311–12 (1972) (per curiam).

10. *See Federal Executions: 1927–Present,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/federal-executions-1927-2003 (last visited Jan. 2, 2019). The Supreme Court explicitly left this question open in rejecting the death penalty for crimes against persons that do not result in death. Kennedy v. Louisiana, 554 U.S. 407, 437 (2008) ("We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken.").

11. *See Kennedy*, 554 U.S. at 437.

12. *See Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/documents/FactSheet.pdf (last updated Dec. 14, 2018). It was this ratio that concerned the concurring Justices in *Furman*—the death sentences imposed in the cases consolidated under that heading were wanton or freakish because they were needles in a haystack. *See, e.g.*, *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.") (footnote omitted); *id.* at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."). I return to the meaning of *Furman* and its influence on contemporary death penalty jurisprudence later in this article. *See infra* Part IV (discussing penological interests related to the death penalty).

A. The Facts

In 2016, there were 20 people put to death in the United States, a drop of nearly 80% from the post-*Furman* peak of 98 in 1999.[13] There were 31 death sentences imposed by courts in 2016, down more than 90% from the high of 315 last seen in both 1994 and 1996.[14] At this rate, it would take 140 years to execute the 3,000 people currently on death row even if another death sentence were never imposed in this country.[15] In a country of 330 million people, with 2.3 million people in prisons and jails and more than 7 million people under correctional supervision of some kind, the death penalty is simply not, in numerical terms, an important part of how criminal justice is administered.[16]

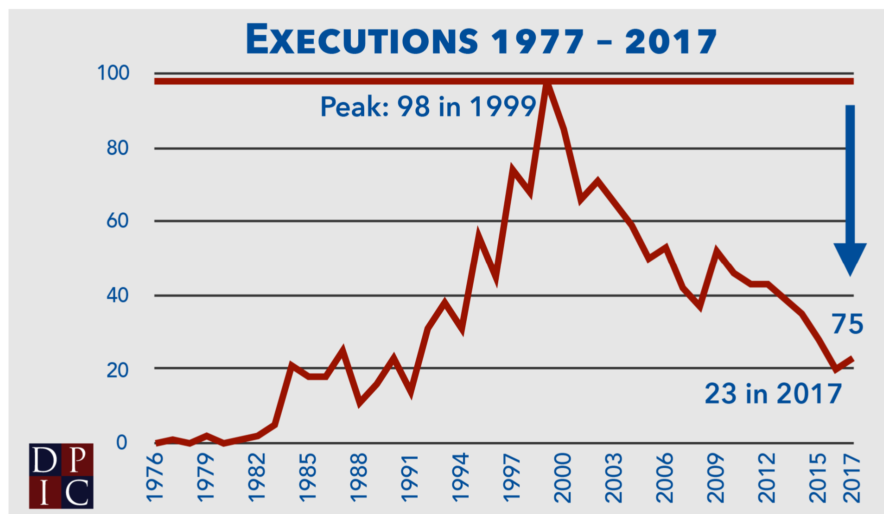

Figure 1: Executions 1977–2017.[17]

And yet, if anything, these numbers *overstate* the use of the death penalty in the United States, as the death penalty—always a geographically localized phenomenon—has in recent years increasingly been imposed and

13. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2017: YEAR END REPORT (2018), https://deathpenaltyinfo.org/documents/2017YrEnd.pdf. A significantly smaller nation executed as many as 200 people a year in the 1930s. *Introduction to the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/part-i-history-death-penalty (last visited Jan. 2, 2019) (noting an average of 167 executions in the 1930s).

14. *See* DEATH PENALTY INFO. CTR., *supra* note 13.

15. *See id.*

16. *See* Press Release, Prison Policy Initiative, Mass Incarceration: The Whole Pie 2018 (Mar. 14, 2018), https://www.prisonpolicy.org/reports/pie2018.html.

17. *See* Death Penalty Info. Ctr., *supra* note 13, at 1.

carried out in fewer and fewer United States jurisdictions.[18] While it is true that thirty of the fifty states retain the death penalty, far fewer use it in any significant way.[19] As the Death Penalty Information Center put it in its 2017 year-end report:

> Use of the death penalty remained geographically concentrated, with executions carried out in just eight states and new death sentences imposed by fourteen states and the federal government. Two states—Texas and Arkansas—accounted for nearly half (48%) of all executions in 2017, with Alabama and Florida, despite the reforms, accounting for an additional quarter. More than 30% of the new death sentences nationwide came from just three counties—Riverside, California; Clark, Nevada; and Maricopa, Arizona. Harris County, Texas is symbolic of the change in capital punishment in the United States. Harris has executed more prisoners than any other county, but for the first time since 1974, it neither executed any prisoner nor sentenced any defendant to death.[20]

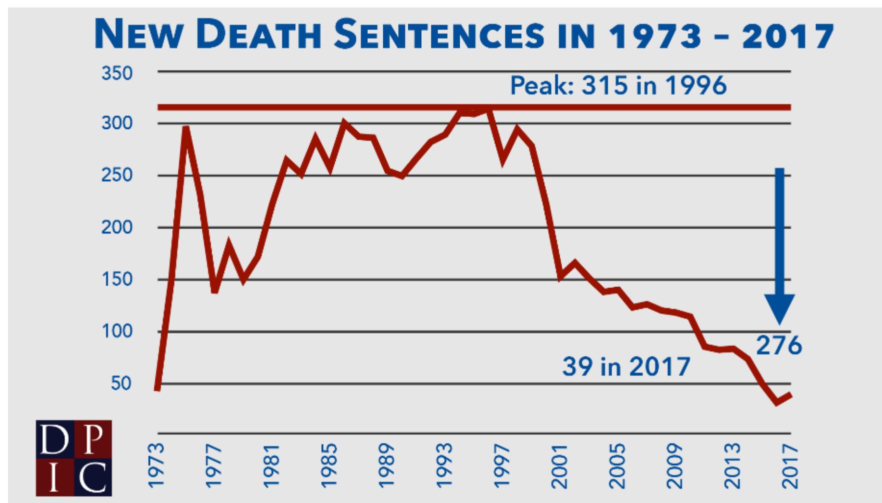

Figure 2: New Death Sentences, 1973–2017.[21]

18. *See, e.g.*, FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 208 tbl.A.1 (2004) (showing a strong correlation between patterns of lynching in the period after the Civil War and contemporary use of the death penalty).

19. *States With and Without the Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/states-and-without-death-penalty (last updated Oct. 1, 2018).

20. DEATH PENALTY INFO. CTR., *supra* note 13; *see also* Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73, 93–97 (2007) (describing disparity in the rates of death penalty prosecutions between states, between prosecutors' offices within a single state, and between United States Attorneys' Offices around the country).

21. *See* DEATH PENALTY INFO. CTR., *supra* note 13, at 1.

Most states and nearly all of the counties in the United States imposed no new death sentences in 2017.[22]

Furthermore, the number of jurisdictions ostensibly permitting the imposition of the death penalty (33) represents a significant drop over the last 60 years:

> As of 1960, the death penalty was available at least in theory in all US states and jurisdictions except for Michigan, Wisconsin, Maine, Minnesota, Alaska, and Hawaii: a total of 47 Jurisdictions. By 1965, Vermont, Iowa, and West Virginia had abolished, leaving 41 states, the District of Columbia, the federal government, and the military as retentionist jurisdictions. All 44 of these laws were invalidated in 1972. . . .
>
> Following *Furman*, the modern death penalty returned quickly, though it never reached its previous levels. Modern figures reached a maximum of 40 jurisdictions on December 31, 1983, when the US military re-enacted the death penalty. . . . Beginning in 2007, a downward trend has brought the number from 40 to 33 as of December 31, 2015.[23]

Thus, of the 53 American jurisdictions (all fifty states, D.C., the federal and military systems of justice), the number authorizing capital punishment has fallen by nearly a third over the last half-century, from 47 in 1960 to 33 today.[24]

We could debate why this is so. In those states that have either recently abolished the death penalty or imposed moratoria on executions, it seems clear that concerns about executing the innocent play an important role.[25] The spate of DNA exonerations that began in the late 1990s appears to have soured some members of the public on the imposition of a sentence as irreversible as death.[26] In addition, the near-uniformity of life without the

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22. *See id.*; *see also* James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 263 (2011) ("[C]ounty-level analysis reveals that the modern American death penalty is a distinctly minority practice across the United States and in most or all of the thirty-four so-called death penalty [s]tates.").

23. FRANK BAUMGARTNER ET AL., DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY 10–12 (2017) (footnotes omitted).

24. *See id.*

25. *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 118 (2010) ("The cost question emerged as a central consideration in the many states that have considered restricting the death penalty (including the three that recently abandoned capital punishment—New Jersey in 2007, New Mexico in 2009, and New York in 2004).").

26. Drew DeSilver, *Lower Support for Death Penalty Tracks with Falling Crime Rates, More Exonerations*, PEW RES. CTR. FACTTANK (Mar. 28, 2014), http://www.pewresearch.org/fact-tank/2014/03/28/lower-support-for-death-penalty-tracks-with-falling-crime-rates-more-exonerations/ ("Researchers have suggested several reasons for the decline in death-penalty support since the mid-1990s. Among them: a steep drop in the incidence of violent crime, and greater attention to wrongful convictions (http://www.innocenceproject.org/), which has led to more than 1,300 convicts being exonerated (http://www.law.umich.edu/special/exoneration/Pages/about.aspx) through DNA evidence, revelations of faulty forensic work, or other means.").

possibility of parole (LWOP) as an alternative sanction to death[27] seems to have decreased the perceived need for the law's ultimate punishment.[28] Finally, fiscal concerns cannot be discounted; it is well documented that the cost of a capital case far exceeds that of a non-capital murder case.[29] Many prosecutors' offices, which bear the burden of trial costs, and states, which bear the burdens of incarceration and appeal, may simply be deciding that the benefits of a capital prosecution are not worth the candle.[30]

For whatever reason, however, it seems clear that use of the death penalty has dropped, and dropped significantly, over the last generation.

B. Relative Scarcity

Of course, the decline in the use of the death penalty is only half of the story. To show that the death penalty is being used less frequently *in those cases in which it could be used*, it is necessary to dig further into the data and see how the number of death sentences in the United States compares to the number of death-eligible killings in the country in a given year. At the outset, it must be noted that the drop in the use of the death penalty has coincided with a significant drop in the murder rate in the United States.[31] Despite the President's rhetoric to the contrary,[32] homicide rates in the United States have

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27. Julian H. Wright Jr., *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529, 565–66 (1990).

28. Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1458 (1998) (reporting "a consistent 15-20% decrease in support for capital punishment when life without parole is the explicit alternative").

29. *See, e.g.*, Judge Arthur L. Alarcón & Paula M. Mitchell, *Costs of Capital Punishment in California: Will Voters Choose Reform this November?*, 46 LOY. L.A. L. REV. 221, 224 (2012) ("Our updated analysis reveals that maintaining the current dysfunctional death-penalty system in California from now until 2050 will cost taxpayers a minimum of an additional $5.4 billion, and possibly as much as an additional $7.7 billion, over the cost of LWOP.") (footnote omitted); *see also* Justin F. Marceau & Hollis A. Whitson, *The Cost of Colorado's Death Penalty*, 3 U. DENV. CRIM. L. REV. 145, 162 (2013) ("[W]e found that death prosecutions require substantially more days in court, and take substantially longer to resolve, than non-death-prosecuted first degree murder cases that result in a sentence of LWOP. The costs of these prosecutions are not offset by any tangible benefit. Our study shows that not only are death penalty prosecutions costly compared to non-death cases, but the threat of the death penalty at the charging stage does not save costs by resulting in speedier pleas to first degree murder.").

30. *See* Steiker & Steiker, *supra* note 25, at 126; *see also* Liebman & Clarke, *supra* note 22, at 340 (discussing the way non-executing areas subsidize the decisions of small minorities of the population to seek the death penalty) ("[F]or decades the majority of communities and taxpayers that rarely use the death penalty have borne a huge share of the costs of the ragged largely symbolic death verdicts that a minority of parochial and libertarian communities prefer over systematic law enforcement.").

31. *See generally* MATTHEW FRIEDMAN ET AL., CRIME TRENDS: 1990–2016 (2017), https://www.brennancenter.org/sites/default/files/publications/Crime%20Trends%201990-2016.pdf.

32. *See* Peter Baker & Michael D. Shear, *Donald Trump Is Sworn in as President, Capping His Swift Ascent*, N.Y. TIMES (Jan. 20, 2017), https://www.nytimes.com/2017/01/20/us/politics/trump-inauguration-day.html ("Mr. Trump's view of the United States was strikingly grim for an Inaugural Address—a country where mothers and children are 'trapped in poverty in our inner cities,' where 'rusted-out factories' are 'scattered like tombstones across the landscape' and where drugs and crime 'have stolen too many lives.' 'This American carnage,' he declared, 'stops right here and stops right now.'").

been dropping for some time and are down more than a third from their high in the late 1990s.[33] Previously dangerous cities like New York have seen their homicide rates fall by as much as 82% from their peak a generation ago.[34] While hotspots like Chicago continue to see a wearying level of violence,[35] Americans are actually far safer than they have been in a generation.[36]

Even with this decline, however, there were still 16,459 murders and non-negligent homicides in the United State in 2016, producing a murder rate that far exceeds that of other G7 countries.[37] The first thing that should be obvious right away from this total is that the number of death sentences imposed in the United States (31 in 2016) is a tiny fraction of the number of murders that take place.[38] Of course, not all of these cases were eligible for death, either under the laws of the various states or the dictates of the Eighth Amendment as it has been interpreted by the Supreme Court.[39] Since *Furman v. Georgia* was decided in 1972, the Supreme Court has required the states to identify a subset of killings that are eligible for death.[40] Following the lead of the Model Penal Code, states do this either by narrowing the scope of first degree murder or by specifying aggravating factors that serve as prerequisites to a death sentence.[41] The purpose of statutory narrowing, the Court has made

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33. *2016 Crime in the United States Table 1*, FED. BUREAU INVESTIGATION, https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-1 (last visited Jan. 2, 2019).

34. *See, e.g.*, FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL 9 (2012).

35. *See* Aamer Madhani, *Another Bloody Weekend in Chicago: 9 Dead, 45 Wounded in Gun Violence*, USA TODAY (June 18, 2018, 6:05 PM), https://www.usatoday.com/story/news/2018/06/18/chicago-violence-54-shootings-fathers-day-weekend/711238002/.

36. *See 2016 Crime in the United States Table 1*, *supra* note 33.

37. *2016 Crime in the United States Table 2*, FED. BUREAU INVESTIGATION, https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/expanded-homicide-data-table-2.xls (last visited Jan. 2, 2019). I focus here on total homicides, not the American homicide rate per 100,000 people. While the rate is a better measure of how safe Americans are in America (how many killings per 100,000 people), killings are the appropriate measure of the fraction of killings that lead to death sentences. *See id.*

38. *See 2016 Sentencing*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/2016-sentencing (last visited Jan. 2, 2019).

39. *See* Jeffrey Fagan et al., *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803 (2006) (analyzing crimes eligible for the death penalty and the deterrent effect of the penalty itself). The factors that make a killing eligible for death vary by jurisdiction. *Id.* at 1817–18. Generally speaking, a defendant must be convicted of first-degree murder, and a jury must find that certain aggravating factors are present. *See* Lowenfield v. Phelps, 484 U.S. 231, 242–44 (1988).

40. *See infra* Part IV (providing a thorough discussion of *Furman*).

41. *See, e.g.*, *Lowenfield*, 484 U.S. at 246 ("[T]he narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase."). Since being endorsed by the Supreme Court in *Gregg v. Georgia*, the Model Penal Code approach has come to dominate in the states. *See, e.g.*, Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 378–79 (1994) ("[T]he Model Penal Code received the endorsement of the Supreme Court and became the model for the new law of capital murder.") (footnote omitted).

clear, is to limit the possibility of caprice and prejudice to find their way into capital sentencing.[42]

Because the laws of the various states differ as to the particular circumstances that make killers eligible for death, and because the FBI collects only some data on killings occurring in the states, it is very difficult to determine exactly what percentage of all killings are eligible for death.[43] But it is certainly possible to estimate the size of the death-eligible murder pool. In a forthcoming study, Jeff Fagan and Amanda Geller look at the entire FBI Supplementary Homicide database of 504,475 non-negligent killings that occurred between 1976 and 2009 to determine, among other things, what percentage of these killings were death eligible.[44] Fagan and Geller created a fictional, but representative, capital statute based on the statutes employed in Maryland, California, and Texas, and then used variables coded in the Supplementary Homicide database to determine whether those factors were present in a particular case.[45]

The Fagan and Geller study found that at least 25% of all killings included in that database, more than 125,000 in total, were death eligible.[46] During that period, United States courts imposed a total of 7,662 death sentences, or approximately one death sentence for every sixteen eligible killings.[47] It is important to remember, however, that this study calculates the number of death-eligible killings solely on the basis of a few objective, easily coded, aggravating factors.[48] Had the list included additional objective factors, not coded in the Supplementary Homicide database or the kind of subjective factors that flourish in the states' death penalty statutes, the fraction of death-eligible killings would certainly grow (and the

42. *Lowenfield*, 484 U.S. at 257 ("[T]he narrowing requirement is meant to channel the discretion of the sentencer. It forces the capital sentencing jury to approach its task in a structured, step-by-step way, first determining whether a defendant is eligible for the death penalty and then determining whether all of the circumstances justify its imposition.").

43. *See Crimes Punishable by the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/crimes-punishable-death-penalty (last visited Jan. 2, 2019) (summarizing the requirements of different state death-penalty statutes).

44. *See* Jeffrey Fagan & Amanda Geller, *Police, Race, and the Production of Capital Homicides*, 20 (Columbia Pub. Law Research, Paper No. 14-593, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202470; *see also* Fagan et al., *supra* note 39, at 1819 (analyzing the percentage of crimes eligible for the death penalty).

45. *See* Fagan & Amanda Geller, *supra* note 44. The aggravating factors include: "felony murders (killings during the course of other enumerated crimes[)], killings of children six years of age or younger, multiple victim killings, 'gangland' killings, 'institution' killings, sniper killings, killings during drug transactions, and contract killings." *Id.* at 23 (citation omitted).

46. *See* Fagan et al., *supra* note 39, at 1823.

47. *See id.* (noting the calculation as being 125,626/7662 = 16.40). Were we to shift the data to account for the fact that death sentences are not generally imposed in the same year that a crime is committed, the disconnect between the number of eligible murderers and the number of death sentences actually becomes more acute. *See id.* at 1842–43. Because there were so few death sentences at the end of this period, lagging death sentences by one, two, or three years produces ratios of 16.86, 17.06, and 17.50, respectively. *See id.*

48. *See id.* at 1816–17.

death-penalty sentencing rate would correspondingly shrink).[49] And, because we know precisely the number of death sentences that were handed out nationwide during this period, the percentage of death-eligible murders leading to a death sentence would necessarily drop were we able to examine these killings more closely.[50] Thus, it is fair to see the one-in-sixteen death-penalty sentencing rate implicit in the Fagan and Geller study as an upper limit on the share of killings that lead to death sentences (because the numerator cannot increase but the denominator quite easily can).[51] In other words, at least fifteen out of every sixteen people who are eligible for the death penalty in this country do not receive it.[52]

As I hope to make clear in the final section, the reality may be that the death penalty is used in a small percentage of eligible cases, and this fact may prove devastating to the future of the death penalty in the United States.

III. RARITY AS SOCIETAL REJECTION

Perhaps the most straightforward argument against the death penalty based on the foregoing is this: the death penalty's imposition in only a tiny fraction of murder cases indicates that the penalty has been rejected by contemporary society.[53] As the Supreme Court has reiterated time and again, the Eighth Amendment was not meant to be a snapshot, freezing criminal justice practice at the time the Amendment was adopted.[54] A static reading of the Amendment would permit punishments such as death and severing the hands of thieves, penalties explicitly countenanced by the Founders.[55] Rather, the Supreme Court has determined that the Eighth Amendment should draw its meaning from contemporary practice:

> [T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic "precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense." Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that "currently prevail." The Amendment "draw[s]

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49. *See id.* at 1814–15.

50. *See id.* at 1823.

51. *See id.* It is worth noting that the Fagan and Geller study included killings in both death penalty and abolitionist states. *See id.* at 1826–27. Thus, there is a built-in gap between the number of killings occurring and the number of killings that result in courts' imposition of a death sentence. *See id.*

52. *See id.* at 1823.

53. *See generally id.* (showing the death penalty is only applied in a small fraction of cases).

54. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 101 (1958) (concluding that the Eighth Amendment derives its meaning from "the evolving standards of decency that mark the progress of a maturing society").

55. U.S. CONST. amend. V (stating that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or *limb*") (emphasis added).

its meaning from the evolving standards of decency that mark the progress of a maturing society."[56]

The principal means for determining contemporary standards, the Court has explained, is by examining penological practice in the states.[57] Although the Court has asserted that it will exercise its own, independent judgment regarding the appropriateness of a particular punishment, it affords great weight to the way a particular punishment is implemented in the various states.[58] The states' views are to be determined not only by looking at the laws that they have enacted but also by examining the way prosecutors and juries apply those laws in practice.[59]

In the years since *Gregg v. Georgia* was decided in 1976, the Court has invoked this analysis repeatedly to narrow the permissible scope of the death penalty.[60] Over the last forty years, the Court has rejected the death penalty for those who were under sixteen at the time they committed their crimes,[61] then for those under eighteen at the time they committed their crimes,[62] for the mentally disabled,[63] for those who were less than active participants in a capital crime,[64] and for the commission of a crime against a person that did not result in death.[65] During this same period, broader Eighth Amendment challenges were often brought against the death penalty; however, the Court has consistently held that the penalty is not unconstitutional per se.[66] In fact,

56. Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (alteration in original) (citations omitted).

57. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005) (finding no violation of the Eighth Amendment in the execution of those who were over fifteen but under eighteen at the time they committed their crime, in part, because 22 of the 37 death penalty states at the time permitted the execution of sixteen-year-olds and 25 of the 37 states permitted the execution of seventeen-year-olds); Thompson v. Oklahoma, 487 U.S. 815, 831–33, 838 (1988) (invalidating the death penalty for those who were under sixteen at the time they committed their crimes, in part, because jurors rarely imposed the death penalty for these crimes and no state had executed a defendant for a crime committed while under sixteen in forty years).

58. *Kennedy*, 554 U.S. at 421 ("Consensus is not dispositive. Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose.").

59. *See, e.g.*, *Roper*, 543 U.S. at 590 (O'Connor, J., dissenting) (quoting Coker v. Georgia, 433 U.S. 584, 596 (1977)) ("[D]ata reflecting the actions of sentencing juries, where available, can also afford 'a significant and reliable objective index' of societal mores.").

60. *See Kennedy*, 554 U.S. at 448 (Alito, J., dissenting) (stating the Court will look to the states when determining the appropriateness of punishment); *Roper*, 543 U.S. at 564–67 (analyzing how to determine the states' views on punishment); Gregg v. Georgia, 428 U.S. 153 (1976).

61. *See Stanford*, 492 U.S. at 380.

62. *See Roper*, 543 U.S. at 573–74.

63. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

64. *See* Tison v. Arizona, 481 U.S. 137, 158 (1987).

65. *Kennedy*, 554 U.S. at 447. The Supreme Court has also applied this analysis to juvenile non-capital sentencing, forbidding automatic life without possibility of parole sentences for juveniles and forbidding a life without parole sentence. *See* Graham v. Florida, 560 U.S. 48, 82 (2010).

66. *See* Glossip v. Gross, 135 S. Ct. 2726, 2739 (2015) ("[W]e have time and again reaffirmed that capital punishment is not *per se* unconstitutional."); Baze v. Rees, 553 U.S. 35, 47 (2008) ("We begin with the principle, settled by *Gregg*, that capital punishment is constitutional."); Coker v. Georgia, 433

at no time have there been more than two votes on the Court for this proposition.[67]

Of course, the Court's rejection of categorical challenges to the death penalty in the past, while undoubtedly persuasive on the current Court, does not prevent the Court from coming to a different conclusion today. Notwithstanding the Court's occasional assertions that the question of the death penalty's constitutionality was settled or resolved in *Gregg*,[68] the Supreme Court is free to return to that question at any time and to arrive at a different conclusion.[69] The determination of whether death comports with contemporary societal norms is necessarily limited to the time at which it was made.[70] A prior decision that the death penalty is not unconstitutional per se does not bind a later Court, and indeed, need not even be overturned if a later Court comes to a different conclusion[71]—what violates the Eighth Amendment today did not necessarily violate it in 1972, 1976, or 1986.

Thus, the Court could use the decreasing use of the death penalty as an opportunity to revisit the question of whether contemporary society has rejected its use. To the counterargument that the death penalty is still authorized in a majority (even a super-majority) of American states,[72] one could rightly answer not just that the practice of capital punishment tells a very different story but also that the decisions of state legislatures are only one data point to consider when evaluating a punishment's acceptance by contemporary society. For example, at the time that the Supreme Court

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U.S. 584, 591 (1977) ("It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment . . . neither is it always disproportionate to the crime for which it is imposed.").

67. *See, e.g.*, *Glossip*, 135 S. Ct. at 2755–57 (Breyer, J., dissenting) (showing two Justices dissenting on constitutionality grounds). Justices Brennan and Marshall expressed their general disapproval of the death penalty while they were on the Court, serving as the lone dissenting voices in *Gregg v. Georgia*. *See* Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting). Toward the end of his tenure on the Court, Justice Blackmun expressed his exasperation with the penalty, announcing in his dissent in *Callins v. Collins*: "I no longer shall tinker with the machinery of death." Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). Other Justices have concluded, after leaving the bench, that they ought to have voted to invalidate the death penalty. *See, e.g.*, Editorial, *Justice Powell's New Wisdom*, N.Y. TIMES (June 11, 1994), https://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html ("Asked whether he would change his vote in any of the cases that had come before him, [retired Justice Lewis Powell] replied: 'Yes, McCleskey v. Kemp.' Indeed, he added that he now found capital punishment itself unworkable and would vote against it in any case."). At least two Justices on the Court have expressed deep concerns about the way the death penalty is currently administered in the United States. *See Glossip*, 135 S. Ct. at 2755 (Breyer, J., dissenting) ("[R]ather than try to patch up the death penalty's legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.").

68. *See, e.g.*, *Glossip*, 135 S. Ct. at 2739.

69. *See supra* notes 61–65 and accompanying text (detailing instances in which the Supreme Court has declared the application of the death penalty unconstitutional).

70. *See supra* notes 54–55 and accompanying text (describing why a static reading of the Eighth Amendment runs contrary to the Supreme Court's criminal justice jurisprudence).

71. *See supra* note 56 and accompanying text (discussing why capital punishment is measured against evolving standards of decency).

72. *See States With and Without the Penalty*, *supra* note 19.

decided *Roper v. Simmons* (invalidating the execution of those who were under eighteen), 20 of the 38 states that authorized the death penalty permitted the execution of minors.[73]

Rather, the Supreme Court has, in a number of recent cases, focused on the direction of legal change rather than on the total number of states adopting a particular policy.[74] As we have seen, the number of death penalty states in the United States has been in consistent decline over the last dozen or so years.[75] Governors, state legislatures, voters, and state high courts have all weighed in on the continued suitability of the death penalty, and the policy change that has resulted is nearly uniform in the direction of abolition.[76] So, for example, the state supreme courts of New York,[77] Connecticut,[78] and Delaware[79] each voted to invalidate their states' death penalties under their state constitutions. On the legislative front, the States of Illinois,[80] Maryland,[81] New Jersey,[82] and New Mexico[83] have all voted to repeal the death penalty in recent years. The only true exception to the universal movement away from the death penalty at the state level is the experience of Nebraska. In 2015, Nebraska's unicameral legislature voted to rescind the penalty,[84] but that choice was rejected by the voters in a popular referendum in 2016.[85] Still, this rejection of abolition led to no net movement away from capital punishment; it merely maintained the status quo ante.[86]

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73. *See* Roper v. Simmons, 543 U.S. 551, 573–74 (2005); Shawn E. Fields, *Constitutional Comparativism and the Eighth Amendment: How a Flawed Proportionality Requirement Can Benefit from Foreign Law*, 86 B.U. L. REV. 963, 979 (2006).

74. *See* Atkins v. Virginia, 536 U.S. 304, 315 (2002) ("It is not so much the number of . . . States that is significant, but the consistency of the direction of change."); *see also* Kennedy v. Louisiana, 554 U.S. 407, 418 (2008) (citing *Atkins* and *Roper* for the change in society proposition); *Roper*, 543 U.S. at 567 (citing *Atkins* for the change in society proposition).

75. *See supra* notes 20–24 and accompanying text (listing the decline in states authorizing capital punishment).

76. *See supra* notes 19–24 and accompanying text (describing the trend of states shifting toward the abolition of capital punishment).

77. People v. LaValle, 817 N.E.2d 341, 344 (N.Y. 2004).

78. State v. Santiago, 122 A.3d 1, 7–9 (Conn. 2015).

79. Rauf v. State, 145 A.3d 430, 433–34 (Del. 2016).

80. Julie Bosman, *Nebraska Bans Death Penalty, Defying a Veto*, N.Y. TIMES (May 27, 2015), https://www.nytimes.com/2015/05/28/us/nebraska-abolishes-death-penalty.html.

81. *See id.*

82. *See id.*

83. *See id.*

84. *Id.*

85. *See* NEB. SEC'Y OF STATE, REVISED OFFICIAL REPORT OF THE BOARD OF STATE (2016), http://www.sos.ne.gov/elec/2016/pdf/2016-canvass-book.pdf (reporting that, by a vote of 494,151 to 320,719, the decision to repeal the death penalty was itself repealed in Nebraska).

86. *See* Bosman, *supra* note 80. In addition, voters in a number of states have rejected initiatives that would have invalidated the death penalty. *See California Proposition 62, Repeal of the Death Penalty (2016)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016) (last visited Jan. 2, 2019). California failed to pass such an initiative in both 2012 and 2016. *See id.* Again, though, the failure to make progress toward abolition should not be falsely equated with evidence of the retrenchment of capital punishment. *See id.*

Ultimately, however, I believe that this argument is likely to prove unavailing in the present political climate. Although Justices Breyer and Kagan have made clear their willingness to return to the broader question of the death penalty's constitutionality, it seems very unlikely that there will be five votes to declare the death penalty unconstitutional any time soon.[87] In contrast to the executions of juveniles, the mentally disabled, or those who committed their crimes while underage, the consensus against executing convicted murderers has not yet reached the level of universal disapproval that would be necessary to convince the current Supreme Court of its obsolescence.[88] Nonetheless, as I discuss in the next Part, it can still be quite plausibly argued that a penalty imposed on such a small percentage of those eligible for it serves no valid penological purpose.

IV. NO VALID PENOLOGICAL INTEREST

Justice White began his concurring opinion in 1972's *Furman v. Georgia* with what he believed to be a near truism: "[T]hat the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system."[89] The then-extant Georgia system, he wrote, had reached such a state: "I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."[90]

A punishment that serves no valid penological interest is imposed wantonly, gratuitously, and, therefore, unconstitutionally.[91] In order to justify a more severe punishment than LWOP, then, death penalty proponents must demonstrate that some valid penological justification supports the imposition of that punishment rather than the less severe one. Otherwise, that incremental punishment is gratuitous and necessarily a violation of the Eighth Amendment.[92] Whether such a penological justification can support the

87. *See* Glossip v. Gross, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting).

88. *See id.* at 2731 (majority opinion).

89. Furman v. Georgia, 408 U.S. 238, 311 (1972) (White, J., concurring).

90. *Id.* at 313.

91. Atkins v. Virginia, 536 U.S. 304, 319 (2002) ("Unless the imposition of the death penalty . . . 'measurably contributes to one . . . of these goals, it "is nothing more than the purposeless and needless imposition of pain and suffering," and hence an unconstitutional punishment.'") (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982)).

92. *See, e.g.*, Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 481 (2005) ("A 'cruel' punishment is a harsh punishment, one that inflicts suffering. But harshness is a necessary, not a sufficient condition. Otherwise, virtually all punishments would be 'cruel' simply because they impose unwelcome hardships. The Court has avoided this anomalous result by appealing to the idea of unnecessary suffering. A 'cruel' punishment, it has declared, is one 'so totally without penological justification that it results in the gratuitous infliction of suffering.'") (footnotes omitted) (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion)); *see also* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 61 (1974) ("[A]ny punitive suffering beyond societal need is, in this context, what defines cruelty.").

imposition of capital punishment is one of the most often discussed policy issues surrounding the death penalty.[93] In this Part, I focus on the special challenges that the infrequent application of the death penalty creates for death penalty advocates.

A. Deterrence

General deterrence is the concept that criminals, as rational actors, will be less inclined to commit crimes if they see that others are being punished for their crimes.[94] With regard to the death penalty, the argument for deterrence must be that the incremental increase in punishment from LWOP to death has a marginal effect on potential killers—that is, that it deters some from killing who would not be deterred by the lesser punishment of LWOP. While it is reasonable to assume that increases in punishment have a general downward pressure on crime commission, there are certain factors particular to this context that would make this assumption suspect with regard to the modern application of the death penalty.

First, murder is the crime for which deterrence seems least likely to be effective. If deterrence relies on rational action (even on a subconscious level), then it is likely to be most effective for crimes of deliberation—white collar crimes, such as embezzlement, forgery, insider trading, or tax fraud.[95] Such crimes are purely economic and committed by those with both the time and the ability to reflect on whether the commission of the crime is worth the risk.[96]

Very different circumstances describe most crimes of violence, however. With rare exceptions—such as murders for hire or the killings of witnesses or government officials—most killings are impulsive, violent acts.[97] The killer is generally unconcerned with consequences at the time that

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93. *See, e.g.*, Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 752–53 (2005) (describing the "stylized form of dance" that typifies capital punishment debates).

94. *See, e.g.*, Kevin C. Kennedy, *A Critical Appraisal of Criminal Deterrence Theory*, 88 DICK. L. REV. 1, 3 (1983) ("Under general deterrence theory persons are punished for violating the criminal law to serve as object lessons for the rest of society. Society, according to the theory, thus transmits the following message: It is wrong to behave in certain ways, and if a person behaves in one of those ways and fails to obey the law, society will punish him or her accordingly."). General deterrence's cousin, specific deterrence, is the theory that a defendant must be punished in order to discourage her from committing other, similar offenses in the future. *See* United States v. Irey, 612 F.3d 1160, 1212–13 (11th Cir. 2010). Given that most capital cases present the question of whether a defendant will die in jail of natural causes or as a conscious act of the state, the question of deterring future misconduct by her is not usually considered. *See Furman*, 408 U.S. at 311–14 (White, J., concurring). The exception, of course, is crimes committed while incarcerated. *But see id.* at 352–63 (Marshall, J., concurring).

95. *See generally* Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1, 16 (2004).

96. *Id.* at 12.

97. *See* Kennedy, *supra* note 94.

he acts.[98] While we might expect that our capital statutes would single out for capital punishment those killers most likely to be deterred, modern capital statutes do, at best, a middling job of this.[99] For example, while lying in wait, killing a witness, and killing for profit are often listed as aggravating factors sufficient to make a killing death eligible, so too are factors that seem to single out impulsive, unthoughtful killings.[100] Of these, the most obvious example is felony murder.[101] Under this doctrine, even unintended killings

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98. *See id.*

99. *The Case Against the Death Penalty*, ACLU, https://www.aclu.org/other/case-against-death-penalty (last visited Jan. 2, 2019).

100. *See, e.g.*, ALA. CODE § 13A-5-40(a)(14) (2018) ("Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness."); ARIZ. REV. STAT. ANN. §§ 13-751(F)(4)–(5) (2018) ("The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value [or t]he defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value."); CAL. PENAL CODE § 190.2(a)(10) (West 2018) ("The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding."); CAL. PENAL CODE § 190.2(a)(15) (West 2018) ("The defendant intentionally killed the victim by means of lying in wait."); COLO. REV. STAT. ANN. § 18-1.3-1201(5)(f) (West 2018) ("The defendant committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device or a chemical, biological, or radiological weapon."); DEL. CODE ANN. tit. 11, § 4209(e)(g) (West 2018) ("The murder was committed against a person who was a witness to a crime and who was killed for the purpose of preventing the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime, or in retaliation for the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime."); IND. CODE ANN. § 35-50-2-9(b)(3) (West 2018) ("The defendant committed the murder by lying in wait."); KY. REV. STAT. ANN. § 532.025(2)(a)(4) (West 2018) ("The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value, or for other profit."); WYO. STAT. ANN. § 6-2-101(h)(6) (West 2018) ("The murder was committed for compensation, the collection of insurance benefits or other similar pecuniary gain.").

101. *See, e.g.,* FLA. STAT. ANN. § 921.141(6)(d) (West 2018) ("The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb."); MO. ANN. STAT. § 565.032(2)(11) (West 2018) ("The murder in the first degree was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate or attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195 or 579."); N.C. GEN. STAT. ANN. § 15A-2000(e)(5) (West 2018) ("The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.").

are eligible for death if they were committed in the course of an enumerated felony.[102]

The empirical evidence on the deterrent effect of capital punishment is murky. Individual studies have purported to show everything from a brutalization effect—an increase in murders associated with the use of capital punishment[103]—to a savings of eighteen lives per execution carried out.[104] Some have gone so far as to argue that if there is a demonstrated deterrent effect associated with the death penalty, then society has a moral obligation to impose the penalty in order to reap those protective benefits.[105] However, meta-analyses of deterrence studies generally find the data to be inconclusive.[106] For example, a panel commissioned by the National Academy of Sciences in 2012 concluded that

> [R]esearch to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide.[107]

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102. *See, e.g.*, Tison v. Arizona, 481 U.S. 137, 158 (1987) ("Only a small minority of those jurisdictions imposing capital punishment for felony murder have rejected the possibility of a capital sentence absent an intent to kill, and we do not find this minority position constitutionally required.").

103. *See, e.g.*, David R. King, *The Brutalization Effect: Execution Publicity and the Incidence of Homicide in South Carolina*, 57 SOC. FORCES 683 (1978).

104. *See, e.g.*, Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 344 (2003) ("Our results suggest that capital punishment has a strong deterrent effect; each execution results, on average, in [eighteen] fewer murders—with a margin of error of plus or minus [ten]."); *see also* Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397, 398 (1975) (finding that each execution prevents eight killings).

105. *See* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 708 (2005) ("[T]hose who object to capital punishment, and who do so in the name of protecting life, must come to terms with the possibility that the failure to inflict capital punishment will fail to protect life—and must, in our view, justify their position in ways that do not rely on question-begging claims about the distinction between state actions and state omissions, or between killing and letting die."). *But see* Steiker, *supra* note 93, at 755 ("Sunstein and Vermeule's argument in favor of capital punishment presents some conceptual slippery slopes upon which only the deontological arguments that they evade can offer some purchase. Their argument is unable to explain why we might not, under conceivable circumstances, be morally obligated to adopt punishments far more brutal and extreme even than execution, or to inflict similarly brutal and extreme harms on innocent members of an offender's family (as punishment of the offender, not of the innocent), or to extend the use of capital punishment to contexts in which many deaths result from behavior far less culpable than murder, such as highway fatalities due to drunkenness or negligence. From their moral position, the only arguments available to Sunstein and Vermeule against any of these practices are unsatisfactorily contingent on prudential considerations, which will not always provide plausible reasons to avoid such practices.").

106. NAT'L RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY 2 (2012).

107. *Id.* In this regard, the report echoed similar conclusions made by the National Academies of Science a generation before. *See id.* Shortly after the decision in *Gregg v. Georgia*, the National Academies released a report finding that "available studies provide no useful evidence on the deterrent

As one of the nation's leading death penalty researchers recently put it:

> It is now widely accepted among top-flight empirical scholars that not a single study credibly supports the view that capital punishment as administered anywhere in the United States provides any added deterrent beyond that afforded by a sentence of life imprisonment.[108]

Whatever disagreement there may be about the deterrent effect of the death penalty in general, much of the literature suggests that deterrence works best when it increases the likelihood, rather than the severity, of a criminal sentence.[109] This fact is obviously devastating when applied to the American death penalty as it is currently practiced. As discussed above, capital statutes in the states have done a poor job achieving the constitutional mandate to narrow the field of killers to a much smaller subset eligible for death.[110] If a sizeable percentage of the 17,000+ killings in the United States each year are eligible for the death penalty, but only a tiny fraction of them actually lead to a death sentence, the likelihood that death will follow from a killing (and hence the deterrent power of such a sentence) is quite small.[111] If we factor in the reality that two-thirds of all death sentences are ultimately overturned on appeal,[112] and that the time from sentence to imposition of the death penalty is now nearly fifteen years,[113] up from just six years a generation ago,[114] the deterrent effect of capital punishment is weakened further still.

The chances of any killer receiving a death sentence are thus remote, regardless of how egregious the facts of the case might be. To the extent there is a difference between a sentence of life in prison and a sentence of death, that difference will be experienced years or even decades after the killer has

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effect of capital punishment." NAT'L RESEARCH COUNCIL, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 9 (1978).

108. John J. Donohue, *Empirical Analysis and the Fate of Capital Punishment*, 11 DUKE J. CONST. L. & PUB. POL'Y 51, 58 (2016).

109. *See* Silvia M. Mendes, *Certainty, Severity, and Their Relative Deterrent Effects: Questioning the Implications of the Role of Risk in Criminal Deterrence Policy*, 32 POL'Y STUD. J. 59, 59 (2004) ("Many aggregate deterrence studies arrive at estimates that reveal varying effects of the certainty and severity components of deterrence theory, with the certainty of punishment carrying the greater, and many times the only, weight.").

110. *See supra* notes 46–48 and accompanying text (stating that at least 25% of killings are death penalty eligible).

111. *See 2016 Crime in the United States Table 1*, *supra* note 33; *Facts About the Death Penalty*, *supra* note 12.

112. Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209, 209 (2004) ("We collected data on the appeals process for all death sentences in U.S. states between 1973 and 1995. The reversal rate was high, with an estimated chance of at least two-thirds that any death sentence would be overturned by a state or federal appeals court.").

113. *See* NAT'L RESEARCH COUNCIL, *supra* note 107, at 22–24.

114. *Id.*

committed the crime.[115] The expectation that such a marginal difference would be expected to change the behaviors of impulsive killers strains credulity. To quote one study of deterrence in the criminal justice system: "[I]t is hard to believe that in modern America the fear of execution would be a driving force in a rational criminal's calculus."[116]

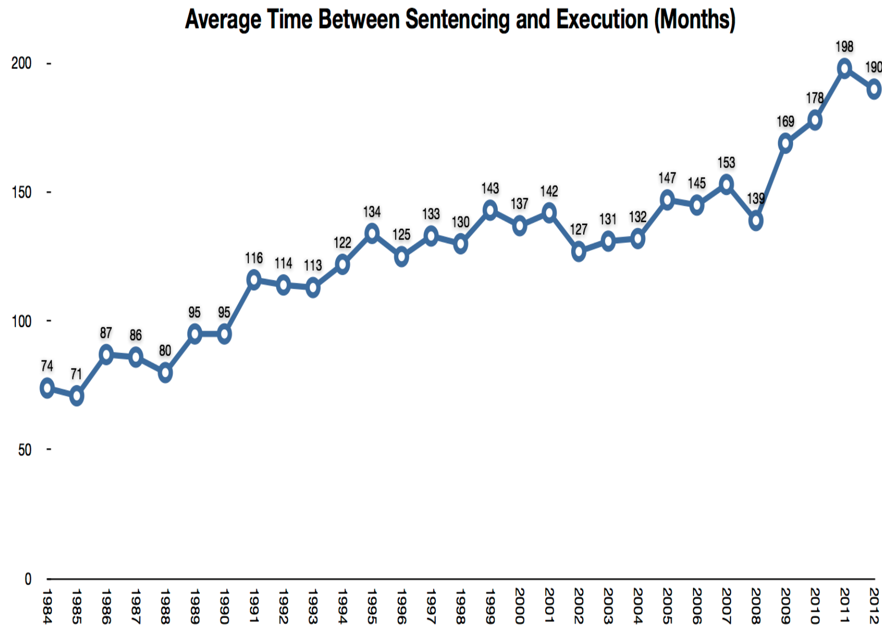

Figure 3: Average Time Between Sentencing and Execution (Months).[117]

B. Incapacitation

If there is one certainty with regard to the death penalty and crime control, it is the ability of capital punishment to incapacitate an individual offender.[118] Unlike indefinite incarceration, the death penalty alone has the capacity to permanently prevent a criminal defendant from committing new crimes in the future. While we may disagree about the capacity of the law's ultimate punishment to deter potential killers or the ethics of imposing the death penalty in order to avoid the possibility of future murders, incapacitation is based on a far simpler understanding of criminal

115. *See, e.g.*, Michael L. Radelet, *The Incremental Retributive Impact of a Death Sentence Over Life Without Parole*, 49 U. MICH. J.L. REFORM 795, 806 (2016); *Time on Death Row*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/time-death-row (last visited Jan. 2, 2019).

116. Lawrence Katz et al., *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318, 320 (2003).

117. *Time on Death Row*, *supra* note 115.

118. *See, e.g.*, JAMES Q. WILSON, THINKING ABOUT CRIME (Basic Books rev. ed. 2013).

punishment: an executed offender can commit no new crimes.[119] Despite the intuitive appeal of this justification, however, the Court has not fully embraced incapacitation as a penological justification for the imposition of the death penalty.[120]

Perhaps the reason for this hesitance is that a death sentence is only marginally more effective, in terms of incapacitation, than is a sentence of LWOP. The rise of LWOP as an alternative to the death penalty has significantly cut into the argument that the death penalty is necessary to protect the public from dangerous offenders.[121] Juries, when satisfied that a convicted killer is incredibly unlikely to be released from prison, seem willing to impose that penalty to satisfy their concerns about the defendant's threat to public safety.[122] Furthermore, public opinion polling indicates that the public often sees LWOP as sufficiently protective of public safety to be a valid substitute for a death sentence.[123]

While it is true that executing murderers is a foolproof method of incapacitating them *after they are executed*, it is hardly true that the imposition of a death sentence leads either swiftly or inexorably to execution.[124] A 2004 study showed that more than two-thirds of death

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119. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 319 (2002) (citing the joint opinion of Justices Stewart, Powell, and Stevens in *Gregg v. Georgia*, for the proposition that retribution and deterrence are the principal justifications for imposing the death penalty). The joint opinion authors merely mention in passing that incapacitation of criminal offenders is another justification that "has been discussed" in connection with the death penalty. Gregg v. Georgia, 428 U.S. 153, 183 n.28 (1976).

120. *See* William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 913 (2010) ("[T]he Court has never explicitly addressed whether future dangerousness or incapacitation alone could be a valid basis for the death penalty. Rather, it has implicitly assumed the constitutionality of using future dangerousness in capital cases without ever squarely addressing the issue.").

121. *See, e.g.*, Radelet, *supra* note 115, at 799 ("Because of changes in sentencing laws over the past thirty years, today anyone who is convicted of a capital offense and *not* sentenced to death will nonetheless die in prison with an LWOP sentence. This substantially undermines the incapacitation argument. Thirty years ago, the usual sentence for such offenders was a relatively lenient dozen years.").

122. *See generally id.* (discussing the retributive nature of the death penalty and the alternative sentence of life without parole).

123. *See* Gelman et al., *supra* note 112, at 258. Death penalty opponents are quick to point out, however, that a LWOP sentence does not eliminate the possibility of continued criminal commission. *See* James W. Marquart & Jonathan R. Sorensen, *A National Study of the* Furman-*Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5, 8–9 (1989) (explaining that death penalty inmates whose convictions are changed to LWOP behave in a manner consistent with normal, prison-inmate behavior). And it certainly denigrates the lives of both fellow inmates and correctional officers to argue that a prisoner serving LWOP is no longer a threat to society. *Id.* at 8–9. Yet research indicates that murderers have one of the lower recidivism rates of any offender group. *Id.* at 9–10. A study of the 188 murderers released as a result of the *Furman* decision in 1972 found that only one murder was committed during the period studied, a recidivism rate of 0.6% per year. *Id.* at 24. *See also* Hugo A. Bedau, *Death Sentences in New Jersey, 1907–1960*, 19 RUTGERS L. REV. 1 (1964) (analyzing the statistical data of death penalty sentences and executions in New Jersey from 1907 to 1960).

124. *See, e.g.*, R.G., *Why So Many Death Row Inmates in America Will Die of Old Age*, ECONOMIST (Feb. 3, 2014), https://www.economist.com/the-economist-explains/2014/02/03/why-so-many-death-row-inmates-in-america-will-die-of-old-age ("At the end of 2011, there were 3,082 prisoners on state and federal death rows in America. That year, 43 were executed. At the current rate (which is slowing) a

sentences are eventually overturned on appeal, most of those on federal habeas corpus.[125] What's more, even for those death sentences that are affirmed, the average time between sentence and execution is about fifteen years, up from just six years a generation ago.[126] Thus, the incremental incapacitative difference between a death sentence and a sentence of LWOP—a sentence now available in every death penalty regime and all but one non-death penalty regimes—is increasingly theoretical.[127]

Once again, the infrequency with which the death penalty is imposed on convicted killers cuts into the incapacitation argument. If the unique incapacitative effect the death penalty can provide is necessary to protect Americans from convicted killers, one would think that the death penalty would be applied more uniformly or against a particularly dangerous subset of those convicted of murder. As the data presented above make clear, however, the death penalty is imposed very infrequently and against a subset of killers that cannot fairly be typified as the worst-of-the-worst.

C. Retribution

At the core of the view that "death is different" is the retributive rationale.[128] Whether the death penalty serves the ontological goals of reducing crime through deterrence or incapacitation, it is argued that it is still a valuable punishment because it announces society's heightened condemnation of certain killings.[129] An ultimate penalty is necessary to express society's extreme disapproval of certain particularly egregious conduct, and the expression of that vehemence through law provides an important outlet that prevents more dangerous expressions.[130] As Justice Stewart wrote in *Furman*, striking down the Georgia law but not joining two of his brethren in striking down the punishment in all instances:

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin

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condemned prisoner has a one-in-72 chance of being executed each year. Because the average death row inmate was 28 when first convicted, it seems unlikely that more than a fraction of them will ever meet the executioner. In 2011, 24 condemned prisoners died of natural causes and 70 had their sentences commuted or overturned.").

125. Gelman et al., *supra* note 112.

126. *See supra* note 117 and accompanying graph (showing the average time between sentencing and execution from 1984–2012).

127. *See* Radelet, *supra* note 115, at 807–08; *infra* note 163 and accompanying table (showing the death sentencing rates in different jurisdictions).

128. Gregg v. Georgia, 428 U.S. 153, 188 (1976).

129. *See* Radelet, *supra* note 115, at 809.

130. *See* Marquart & Sorensen, *supra* note 123, at 26–28; Franklin E. Zimring, *Is Retribution Only for a Few?: Rarity of Death Penalty Makes Most Victims Seem Diminished*, L.A. TIMES (Dec. 4, 1986), http://articles.latimes.com/1986-12-04/local/me-973_1_death-sentences.

> to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.[131]

The infrequency of the death penalty need not necessarily weaken the retributive nature of the death penalty in the United States.[132] That is, if we were confident that the death penalty is limited to the worst-of-the-worst, then its rarity would be a feature rather than a bug. If the evidence supported the conclusion that the death penalty was truly reserved for the worst-of-the-worst, then its use to condemn that behavior could be properly retributive.[133] Unfortunately, the evidence fails to support that conclusion;[134] as will be shown in the next Section, nearly all killings in some states are eligible for death.[135] As Franklin Zimring wrote on the eve of *McCleskey* more than thirty years ago, a death penalty infrequently imposed on a seemingly random subset of all killers denies retribution to nearly all victims' families:

> If we executed 10 times as many killers as we do now, more than at any time in the 20th Century, it would still total only one execution for every 100 killings. How then to choose between terrible killings? Perhaps a lottery.
>
> The irony is that the possibility of execution in a few cases cheats most of those who lose their loved ones to homicide out of the law's full measure. It is human nature to want the law's ultimate punishment as a response to a senseless killing. If capital punishment is society's "ultimate punishment," even in its current symbolic form, victims feel that the enormity of their loss is diminished by anything less.[136]

D. Conclusion

As this quote from Professor Zimring makes clear, the effectiveness of the death penalty as a manifestation of society's retributive impulse depends on the careful selection of the few killers whose crimes are most deserving.[137] This was plain to the Supreme Court at least as far back as *Furman v. Georgia* in 1972.[138] As I will expound upon in the next Part, the controlling Justices

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131. Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

132. *See infra* Part V (suggesting that the infrequency and arbitrariness of the death penalty is consistent with *Furman* abolition).

133. *See* Sam Kamin & Justin Marceau, *Waking the* Furman *Giant*, 48 U.C. DAVIS L. REV. 981, 1002–06 (2015).

134. *See id.*

135. *See, e.g.*, CAL. PENAL CODE §§ 3600–3607 (West 2016); COLO. REV. STAT. ANN. § 18-3-102 (West 2018); *see Crimes Punishable by the Death Penalty*, *supra* note 43.

136. Zimring, *supra* note 130.

137. *See id.*

138. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

in *Furman* were concerned principally by the infrequency with which the death penalty was imposed.

V. THE FAILURE TO NARROW

The infrequency with which the death penalty is imposed has long been seen as a means by which to attack the practice of capital punishment. In 1968, the NAACP Legal Defense and Education Fund (the Fund) argued for the first time in *Boykin v. Alabama* that the death penalty was categorically unconstitutional.[139] One of the principal arguments asserted was that the infrequency with which the punishment was implemented was a fatal flaw:

> The **very rarity** of death sentences and executions, certainly, gives rise to a strong inference of arbitrariness, since it is virtually impossible to conceive non-arbitrary standards by which the very few men chosen to die in America should have been singled out from the enormous class of their death-eligible peers.[140]

While the Fund was unsuccessful in this frontal assault on the penalty, its argument was ultimately adopted by the three crucial concurring Justices in *Furman v. Georgia* in 1972.[141] As is now well known, the Court was sharply divided by *Furman*; the nine Justices of the Court produced ten opinions.[142] In addition to a short per curiam opinion announcing the Court's judgment, each of the Justices wrote his own opinion, with the various opinions falling into three groups.[143] Two of the Justices (Brennan and Marshall) held that the death penalty was cruel and unusual per se.[144] Four of the Justices disagreed and further held that the specific Georgia statute at issue complied with the Eighth Amendment.[145] The *Furman* decision drew its meaning from the opinions of the three remaining Justices (Stewart, Douglas, and White) who were unwilling to go along with their colleagues in finding the death penalty unconstitutional per se but, nonetheless, found the Georgia statute lacking.[146]

139. Boykin v. Alabama, 395 U.S. 238 (1969).

140. Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as Amici Curiae, Boykin v. Alabama, 395 U.S. 238 (1969) (No. 642), 1968 WL 112750, at *49.

141. *See generally Furman*, 408 U.S. 238.

142. *See id.*

143. *See id.*

144. *See id.* at 305 (Brennan, J., concurring); *id.* at 370–71 (Marshall, J., concurring).

145. *See id.* at 375–470 (Burger, C.J. & Blackmun, Powell, & Rehnquist, JJ., dissenting).

146. *See id.* at 240–57 (Douglas, J., concurring); *id.* at 306–10 (Stewart, J., concurring); *id.* at 310–14 (White, J., concurring).

All three Justices expressed concern about the infrequency with which the death penalty was being imposed.[147] For example, Justice White wrote:

> [W]hen imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked.[148]

Justice Douglas wrote that the discretion permitted by the system approved in *McGautha v. California*[149] just the year before risked the creation of a caste system among murderers:

> [W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.[150]

Justice Douglas argued that such arbitrary distinctions have no basis in the culpability of the defendant or the severity of his crime.[151] Justice Stewart was in accord: "For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."[152]

These three Justices concurred in the judgment on the narrowest grounds, and their views on the dictates of the Eighth Amendment gave substance to the Court's fractured holding in that case.[153] Their view—that a death penalty statute is invalid if it produces relatively few death sentences and provides little means for distinguishing the few cases in which it is

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147. *See id.* at 249–56 (Douglas, J., concurring); *id.* at 307–10 (Stewart, J., concurring); *id.* at 311–13 (White, J., concurring).

148. *Id.* at 311 (White, J., concurring).

149. McGautha v. California, 402 U.S. 183 (1971).

150. *Furman*, 408 U.S. at 255 (Douglas, J., concurring).

151. *Id.*

152. *See id.* at 309–10 (Stewart, J., concurring) (footnotes omitted). For Justice Stewart, the fault of the death penalty was not in its discriminatory nature (which he felt had not been demonstrated and which he put to one side) but in the seeming randomness with which it is imposed: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 309.

153. *See, e.g.*, Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"). Tellingly, the Court quotes the joint opinion of Justices Stewart, Powell, and Stevens in *Gregg v. Georgia*, explaining how to read the fragmented opinion in *Furman*. *Id.*

imposed from the many in which it is not—remains good law to this day.[154] It was not overturned four years later when the Supreme Court voted in *Gregg v. Georgia* to uphold the revised Georgia death penalty statute.[155] Rather, the seven Justices who voted to uphold the new Georgia statute concluded that Georgia had fixed the infrequency and arbitrariness problems identified by the three concurring Justices four years earlier.[156]

In subsequent opinions, the Court has built upon the requirement that states make meaningful distinctions between those few eligible for death and the many who are not. The Court has made it clear that the states are obligated to use legal rules to differentiate the few who are eligible for the death penalty from the many who are not.[157] While states are free to allow jurors discretion regarding *whether to sentence* a particular, eligible defendant to death or not,[158] the process by which defendants are made *eligible for that penalty* must be governed by comprehensible rules:

> Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to "make rationally reviewable the process for imposing a sentence of death." The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability.[159]

The Court reasoned in *Gregg* that if eligibility rules—principally the definition of first-degree murder and the aggravating circumstances that make some first-degree murderers eligible for death—are doing their work,

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154. *See id.*

155. *See generally* Gregg v. Georgia, 428 U.S. 153 (1976) (upholding Georgia's death penalty statute).

156. *See id.* at 206 ("The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant.").

157. *See* Tuilaepa v. California, 512 U.S. 967, 973 (1994).

158. California v. Ramos, 463 U.S. 992, 1002, 1008 (1983) ("Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.") (footnote omitted); Zant v. Stephens, 462 U.S. 862, 878 (1983) ("Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death.").

159. *See Tuilaepa*, 512 U.S. at 973 (citation omitted); *see also* Kamin & Marceau, *supra* note 133, at 1002–06 (discussing death penalty sentence eligibility, selection, narrowing, and the other byzantine terms the Court has created to govern the death penalty process).

then it would not be unreasonable to expect that substantially all of those eligible for death would ultimately receive that punishment:

> As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries—even given discretion *not* to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined.[160]

Whether this goal—a death penalty in which the pool of eligible defendants is sufficiently narrowed that juries impose the death penalty in a substantial portion of eligible cases—has been achieved or not is necessarily an empirical question.[161] It is difficult to know, by simply looking at a statute, whether it complies with the edicts of the Supreme Court's post-*Furman* jurisprudence.[162] The only way to determine whether states are doing the constitutionally required narrowing work is to analyze their statutes, determine what percentage of cases are eligible for death, and then calculate whether a sizeable proportion of those eligible for death are receiving it as a penalty for their crimes.

A number of authors, including myself, have set about to calculate what percentage of death-eligible killings lead to death sentences in various states. My colleague and I summarized this research in 2013:

160. *Gregg*, 428 U.S. at 222 (White, J., concurring).

161. *See id.*

162. It is possible to imagine, however, a statute that might fail a facial challenge under *Furman*. For example, if a state passed seven aggravating factors, each making death-eligible a killing carried out on a separate day of the week, the Court would rightly point out that, although each of the aggravating factors passes constitutional muster—it is comprehensible, applies to something less than all murders, etc.—taken together, they do no narrowing work whatsoever. Most statutes will not be susceptible to such a critique even if, in practice, they do little more narrowing than the hypothetical.

DEATH SENTENCE RATES IN STATUTORY NARROWING STUDIES[163]
(ranked highest to lowest)

Jurisdiction	Data Set	Death Sentence Rate[164]	Authors
Georgia	1066 non-negligent homicides (sample)	23%	Baldus, et al.[165]
Nebraska	689 homicides	16%	Baldus, et al.[166]
Military	440 homicides	15.5%	Baldus, et al.[167]
New Jersey	455 death-eligible defendants	13.2%	Baldus & Baime[168]
California (Alameda)	473 first-degree murders	12.8%	Shatz & Dalton[169]
California (Appellate)	404 first-degree murders (sample)	11.4%	Shatz & Rivkind[170]
Maryland	6000 murders	5.8%	Paternoster & Brame[171]
California (Statewide)	1299 first-degree murders	5.5%	Shatz & Shatz[172]
California (Baldus)	1900 non-negligent homicides (sample)	4.6%	Baldus[173]
Connecticut	205 death-eligible homicides	4.4%	Donohue[174]
Colorado	539 death-eligible homicides	0.56%	Marceau, et al.[175]

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163. Kamin & Marceau, *supra* note 133, at 1015 tbl.1.

164. Because each study draws on a different data set, we report here only the death sentencing rate for each study (the percentage of those statutorily death-eligible murderers actually sentenced to death). *See id.* Recall that it was this number that led the *Furman* Court to invalidate the Georgia statute. *See* Furman v. Georgia, 408 U.S. 238, 257 (1972) (per curiam).

165. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 237–38 (Northeastern University Press, 1st ed. 1990).

166. David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 NEB. L. REV. 486, 542–43 (2002).

167. *See* David C. Baldus et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984-2005)*, 101 J. CRIM. L. & CRIMINOLOGY 1227, 1249 (2011).

168. N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 24 (2007), http://www.njleg.state.nj.us/committees/dpsc_final.pdf.

169. Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics:* Furman*,* McCleskey*, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1260–62 (2013).

170. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for* Furman*?*, 72 N.Y.U. L. REV. 1283, 1332 (1997).

171. RAYMOND PATERNOSTER ET AL., AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION 12 (2003), https://www.aclu-md.org/sites/default/files/field_documents/md_death_penalty_race_study.pdf.

172. Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64, 93 (2012).

173. *See* Declaration of David C. Baldus at 28, Ashmus v. Wong, No. 3:93-cv-00594-TEH (N.D. Cal. Nov. 18, 2010).

174. JOHN DONOHUE, CAPITAL PUNISHMENT IN CONNECTICUT, 1973–2007: A COMPREHENSIVE EVALUATION FROM 4686 MURDERS TO ONE EXECUTION 4 (2011), https://deathpenaltyinfo.org/documents/DonohueCTStudy.pdf.

175. Justin Marceau et al., *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069, 1112 (2013).

As this table demonstrates, most of the states studied sentenced between 0% and 16% of eligible murderers to death.[176] This low death sentencing rate compares unfavorably with the Georgia statute that the Supreme Court described as leading to the capricious imposition of the death penalty in *Furman v. Georgia* in 1972.[177] In that case, Chief Justice Burger stated in the dissent that only between 15% and 20% of those eligible for the death penalty were receiving it;[178] it was this level of infrequency that led the controlling three members of the Court to find that the death penalty was too infrequently applied to pass constitutional muster.[179] Nearly every state studied to date fails to improve on the Georgia statute invalidated in *Furman.*

To the argument that the states select only the worst-of-the-worst for the death penalty, one obvious counterargument is that if they do so, they do so entirely by accident. It is true that the most aggravated murders are eligible for death but so are some of the least.[180] While multiple killings, killings of witnesses, and killings of peace officers are included in most death penalty statutes, so too are felony murders, which by almost any measure are the least culpable of all killings.[181] Furthermore, the geographic disparity in the use of the death penalty also gives lie to the argument that we are currently executing only the worst-of-the-worst killers.[182] There is little reason to think that one-third of the worst killings or killers in the country just happen to occur in the three counties responsible for one-third of the death sentences imposed nationally.[183]

More fundamentally, however, the fact that death is being imposed in a tiny subset of all eligible cases cannot be explained away on the theory that it is being imposed in the *right* tiny subset of cases.[184] For what the Supreme

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176. *See supra* note 163 and accompanying table (ranking death sentence rates in statutory narrowing studies). The Fagan and Geller study discussed in Section II.B differs from all of these studies in one principal way. *See* Fagan & Geller, *supra* note 44, at 27–28. That is, it takes as its baseline killings rather than prosecutions. *Id.* In other words, Fagan and Geller include in their denominator a large number of killings that were never solved and, thus, never prosecuted. *Id.*

177. Furman v. Georgia, 408 U.S. 238, 295 (1972) (Brennan, J., concurring).

178. *See id.* at 387 n.11 (Burger, C.J., dissenting) ("Although accurate figures are difficult to obtain, it is thought that from 15% to 20% of those convicted of murder are sentenced to death in States where it is authorized.").

179. *See id.* at 256–57, 309–10, 313 (Douglas, Stewart, & White, JJ., concurring).

180. *See* Guyora Binder et al., *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1142 (2017).

181. *See, e.g.*, *id.* ("That a defendant could be executed for causing death inadvertently might seem absurd. Nevertheless, the great majority of American courts to have considered the question have concluded that the Eighth Amendment of the U.S. Constitution permits such executions. In so doing, they have interpreted Supreme Court doctrine to allow capital punishment of any person who causes death during the commission of a felony, regardless of that person's mental state with respect to the resultant death.").

182. *C.f.*, *supra* notes 18–20 and accompanying text (showing geographical and racial disparity in application of the death penalty).

183. *See supra* note 20 and accompanying text (noting the three counties and the disparity in death penalty rates).

184. *See supra* Part V (discussing the infrequency and arbitrariness of death penalty sentences).

Court has required is not a substantive requirement—make sure that the death penalty is imposed only on the worst-of-the-worst killers—but a procedural one—create a statute that narrows the death penalty to a small subset of murderers.[185] Absent a consensus regarding which killers are the worst-of-the-worst, the Court mandated a process designed to achieve that result.[186] A system that makes nearly every killing death-eligible but imposes death on only a tiny fraction of those cases fails this test, regardless of how carefully, thoughtfully, or even-handedly it is applied by prosecutors and juries.

VI. CONCLUSION

In *Hidalgo v. Arizona*, the petitioner asserted that 98% of murders in Maricopa County, Arizona, were eligible for death, and that as a result, the Arizona death penalty statute was not doing the work required of it by *Furman* and its progeny.[187] Although the Court ultimately decided not to hear the case, four Justices—Breyer, Kagan, Ginsburg, and Sotomayor—expressed interest in the case.[188] Although this quartet could have voted to hear the case, they were likely signaling that they would like to hear a similar claim on a more developed record.[189]

In other words, a non-narrowing claim is coming to the Supreme Court, perhaps sooner than later. As I hope I have set out here, there is likely to be real merit to such a claim. With a proper record demonstrating what Hidalgo alleged in his case, the Court will be hard pressed to sustain the death penalty much longer.

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185. *See* Lowenfield v. Phelps, 484 U.S. 231, 243–46 (1988).

186. *Id.*

187. State v. Hidalgo, 390 P.3d 783 (Ariz. 2017), *cert. denied*, Hidalgo v. Arizona, 138 S. Ct. 1054, 1056 (2018).

188. *Hidalgo*, 138 S. Ct. at 1057.

189. *Id.*

> In support of his Eighth Amendment challenge, the petitioner points to empirical evidence about Arizona's capital sentence system that suggests about 98% of first-degree murder defendants in Arizona were eligible for the death penalty. That evidence is unrebutted. It points to a possible constitutional problem. And it was assumed to be true by the state courts below. Evidence of this kind warrants careful attention and evaluation. However, in this case, the opportunity to develop the record through an evidentiary hearing was denied. As a result, the record as it has come to us is limited and largely unexamined by experts and the courts below in the first instance. We do not have evidence, for instance, as to the nature of the 866 cases (perhaps they implicate only a small number of aggravating factors). Nor has it been fully explained whether and to what extent an empirical study would be relevant to resolving the constitutional question presented. Capital defendants may have the opportunity to fully develop a record with the kind of empirical evidence that the petitioner points to here. And the issue presented in this petition will be better suited for certiorari with such a record.

Id.